SUBJECT INDEX

TABLE OF CASES

Page

L

M

N

O

P

R

S

T

TEXTS CITED

STATUTES AND RULES CITED

No. 31719

IN THE

Supreme Court of the United States

OCTOBER TERM, 1926

No. 304

FOSTER CLINE, as District Attorney for the City and County of Denver, State of Colorado,

Appellant,

vs.

FRINK DAIRY COMPANY, WINDSOR FARM DAIRY COMPANY, THE CLIMAX DAIRY COMPANY, H. BROWN CANNON, CLARENCE FRINK, A. T. McCLINTOCK AND MORRIS ROBINSON,

Appellees.

Appeal from the District Court of the United States for the District of Colorado.

BRIEF OF APPELLEES
Frink Dairy Company, Clarence Frink and A. T. McClintock.

INTRODUCTION.

The decision of the lower court is reported in 9 Fed. (2nd) 176. This case has been appealed under Section 266 of the Judicial Code. The motion to dismiss the bill was

denied November 14, 1925, (R. 32), and appellant having elected to stand on his motion and refusing to plead further, decree was entered December 14, 1925 (R. 33). The bill alleged that the Colorado Anti-Trust Act violated Article XIV of the Amendments to the Constitution of the United States (R. 6, 7). The rulings made by the lower court, which are the basis of this court's jurisdiction, are found in the opinion (R. 37-48).

SUPPLEMENTAL STATEMENT

In addition to appellant's statement of the allegations of the bill, it alleged (R. 7) that the Colorado Anti-Trust Act fails to fix any standard of criminality and fails to define what are reasonable profits; that the appellant had threatened (R. 10) to institute further prosecutions against appellees and (R. 11) to institute proceedings for the forfeiture of their charters, rights and franchises.

SUMMARY OF ARGUMENT

I. The Colorado Anti-Trust Act is Unconstitutional.

- A. It is indefinite and furnishes no ascertainable standard of guilt.
  1. The uncertainty of the Act.
  2. Discussion of appellant's arguments.
     - a. The scope of the Act.
     - b. The rule of reason.
     - c. The Nash case.
     - d. The Waters-Pierce case.
- B. It denies appellees the equal protection of the laws.

II. A federal court will enjoin the enforcement of an unconstitutional state statute where property rights are invaded.

a. The inadequacy of the remedy at law.

b. Appellant's cases distinguished.

c. Section 265 of the Judicial Code.

III. Under the issues made by the pleadings, the right to enjoin the pending proceeding is not before the court.

BRIEF

I.

THE COLORADO ANTI-TRUST ACT IS UNCONSTITUTIONAL

A.

THE COLORADO ANTI-TRUST ACT IS INDEFINITE AND FURNISHES NO ASCERTAINABLE STANDARD OF GUILT.

1. *The Uncertainty of the Act.*

The Colorado Anti-Trust Act, (Appendix A), after prohibiting certain combinations, provides (R. 4):

> "Provided that no agreement or association shall be deemed to be unlawful or within the provisions of this act, the object and purposes of which are to conduct operations at a reasonable profit or to market at a reasonable profit those products which cannot otherwise be so marketed."

Stated in another way, a combination is lawful in Colorado if it makes a reasonable profit, but it violates the Anti-Trust Act if it makes an unreasonable profit. But the Act contains no definition of a "reasonable profit" and is silent as to what factors are to be included or eliminated in arriving at a reasonable profit. It necessarily delegates to a jury the determination of what is or is not a reasonable profit.

The information filed by appellant charged appellees with conspiring to fix and control the price of milk and milk products. Under this proviso it would be a complete defense to prove that only a reasonable profit was made. But how shall the jury determine this reasonable profit?

Shall it be 4% or 20%—either might be said to be within the bounds of reason, and the rate would doubtless vary in different industries and kinds of business. Certain of appellees were selling other commodities besides milk, such as ice, cold storage, butter, buttermilk powder (R. 23), ice cream and eggs (R. 29). Should the reasonable profit be based upon milk alone or upon all the commodities sold, and what portion of the entire overhead charges should be allocated to the milk business? If an apportionment were made, would it be considered fair or aribitrary? Should a reasonable profit depend upon the volume of business with the percentage based on the profit on each quart of milk sold, or upon the percentage the profits bear to the capital investment? Should the question whether the plant was run efficiently and economically, according to improved modern business methods, be taken into consideration? What allowances and reserves should be set aside for depreciation, bad debts, obsolescence and unforeseen contingencies? What amount should be allowed for purchase of new equipment, buildings and supplies? To what extent should the jury revise the expense account? Should differences in market conditions in different localities be considered? Should general trade cycles be considered? These and many other questions which readily come to mind are unanswered by this Act, yet it requires the jury to answer them. It would be impossible for appellees, in carrying on their various lines of business, to know in advance whether they were violating the law—whether they were "felons or patriots." As said by Mr. Justice Stone in United States v. Trenton Potteries Co., U. S. Sup. Ct. Feb. 21, 1927, 71 L. ed. 404, 406. "The reasonable price fixed today may through economic and business changes become the unreasonable price of tomorrow." He also there refers to "the necessity of minute inquiry whether a particular price is

reasonable or unreasonable as fixed," and the "burden of ascertaining from day to day whether it has become unreasonable through the mere variation of economic conditions." Appellees could only learn their fate after a protracted trial and the jury, probably unskilled in technical accounting, had reached a verdict upon what they conceived to be a reasonable profit.

It is well settled by decisions of this court that a criminal statute must define the crime with certainty and furnish an ascertainable standard of guilt to guide and inform the public what it is their duty to avoid, and if the statute fails to do this, and delegates to a jury the fixing of the test or standard, it is lacking in due process, unconstitutional and void. Connally v. General Construction Co., 269 U. S. 385, where an Oklahoma statute making it an offense to pay less than the "current rate of wages in the locality," was held void. In the opinion Mr. Justice Sutherland said, page 391: "That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties, is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law. And a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law." U. S. v. Trenton Potteries Co., U. S. Sup. Ct. Feb. 1927, 71 L. ed. 404, 406; Yu Cong Eng v. Trinidad, 271 U. S. 500, 518; U. S. v. Cohen Gro. Co., 255 U. S. 81 and associated cases decided the same day in which the Lever Act, prohibiting the making of an "unjust or unreasonable rate or charge" for necessities, was held unconstitutional. International Harvester Co. v. Kentucky, 234 U. S. 216, and Collins v. Kentucky, 234 U. S. 634.

where a Kentucky statute prohibiting the charge of more than the "real value" for certain commodities was held unconstitutional. U. S. v. Penn. Ry., 242 U. S. 208, where an order of a Railroad Commission requiring tank cars to be provided upon "reasonable request and reasonable notice" for "normal" shipments, was said to furnish no criterion of application.

The following quotation from the case of U. S. v. Cohen Gro. Co., supra, at page 89, accurately describes the act under which appellees are being prosecuted:

> "It leaves open, therefore, the widest conceivable inquiry, the scope of which no one can foresee, and the result of which no one can foreshadow or adequately guard against. * * * * To attempt to enforce the section would be the exact equivalent of an effort to carry out a statute which in terms merely penalized and punished all acts detrimental to the public interest when unjust and unreasonable in the estimation of the court and jury."

In United States v. Reese, 92 U. S. 214, this court said, at page 220: "If the Legislature undertakes to define by statute a new offense and provide for its punishment, it should express its will in language that need not deceive the common mind. Every man should be able to know with certainty when he is committing a crime."

In United States v. Brewer, 139 U. S. 278, 288, this court said: "Laws which create crime ought to be so explicit that all men subject to their penalties may know what acts it is their duty to avoid."

In Tozer v. United States, 52 Fed. 917, the Interstate Commerce Act prohibiting "undue preferences" was held too indefinite, and Justice Brewer at page 919 said:

"But, in order to constitute a crime, the act must be one which the party is able to know in advance whether it is criminal or not. The criminality of an act cannot depend upon whether a jury may think it reasonable or unreasonable. There must be some definiteness and certainty. In the case of Railway Co. v. Dey, 35 Fed. 866, 876, I had occasion to discuss this matter, and I quote therefrom as follows:

'Now, the contention of complainant is that the substance of these provisions is that, if a railroad company charges an unreasonable rate, it shall be deemed a criminal, and punished by fine, and that such a statute is too indefinite and uncertain, no man being able to tell in advance what in fact is, or what any jury will find to be, a reasonable rate. If this were the construction to be placed upon this act as a whole, it would certainly be obnoxious to complainant's criticism, for no penal law can be sustained unless its mandates are so clearly expressed that any ordinary person can determine in advance what he may and what he may not do under it. In Dwar. St. 625, it is laid down "that it is impossible to dissent from the doctrine of Lord Coke that the acts of parliament ought to be plainly and clearly, and not cunningly and darkly, penned."* * * * In this the author quotes the law of the Chinese Penal Code, which reads as follows: 'whoever is guilty of improper conduct, and of such as is contrary to the spirit of the laws, though not a breach of any specific part of it, shall be punished at least forty blows, and when the impropriety is of a serious nature, with eighty blows.'

There is very little difference between such a statute and one which would make it a criminal offense to charge more than a reasonable rate.' "

In Louisville and Nashville Ry. Co. v. Railroad Commission, 19 Fed. 679, a Tennessee statute prohibiting the charging of more than "just and reasonable compensation" was held void. In Railway Co. v. Dey, 35 Fed. 866, an act prohibiting the charging of "more than a fair and reasonable rate of tolls" was held unconstitutional. In Louisville & Nashville Ry. Co. v. Commonwealth, 99 Ky. 132, a Kentucky statute prohibiting the charging of more than a "just and reasonable rate" was held too indefinite to be enforced. In Hayes v. the State, 11 Ga. App. 371, 75 S. E. 523, a Georgia statute prohibiting a speed greater than is reasonable, was held void for uncertainty.

2. *Discussion of Appellant's Arguments.*

(a) The scope of the Act.

Appellant at page 20 of his brief points out that the Colorado Anti-Trust Act prohibits combinations which do not deal with the subject of prices or commodities or the profits to be realized on the sale thereof. This was commented upon in the decision of the lower court (R. 41), but even though true, this in no way remedies the uncertainty of the statute as applied to appellees. By the admitted facts in the bill, (R. 13), they are charged with price fixing in their occupation of selling milk to the public, which of necessity deals with prices and profits to be made therefrom. It was, therefore, necessary for the jury to determine whether they were making an unreasonable profit, and it is no answer to say that prosecutions might be instituted under the Act against others which would not involve such a question.

Appellant points out at page 10 of his brief that the Colorado Anti-Trust Act has been before the Colorado Supreme Court four times and admits that in none of the cases was the constitutionality of the Act raised or discussed. The fact that the court upheld convictions under the Act cannot therefore give rise to any inference that the Act is constitutional because that question never has been in issue. A decision is only authority for what it decides and not for what it might have decided. As this court has held, the effect of a decision is to be determined by the issues made and submitted and what the court intended to decide and accomplish. Oklahoma v. Texas, United States 71 L. ed. 1, 10; Vicksburg v. Henson, 231 U. S. 259, 273.

(b) The Rule of Reason.

Appellant in his brief, pages 21-24, claims that the Colorado Anti-Trust Act merely adopts the common law as to restraint of trade, and the "rule of reason" as stated in Standard Oil Co. v. United States, 221 U. S. 1, which he claims is a standard for prosecutions under the Sherman Act, and that the Colorado Supreme Court has so construed the Anti-Trust Act in Campbell v. People, 72 Colo. 213, 216. From this premise he argues that the Colorado Anti-Trust Act is valid. In support of this contention he cites Nash v. United States, 229 U. S. 373, in which the Sherman Act was upheld on its criminal side, and Waters-Pierce Oil Co., v. Texas, 212 U. S. 86, where a Texas Anti-Trust Act was upheld in a criminal prosecution. But his premise is wrong for three reasons.

In the first place, the Colorado Supreme Court has not given the Anti-Trust Act such a construction, and has not applied the "rule of reason." The Campbell case, supra, merely held that the court must determine whether the combination charged in the indictment was within the reason

and intent of the statute; and in Atkinson v. Colo. Wheat Growers Assn., 77 Colo. 559, the same judge answered the contention, that the combination in question was lawful unless unreasonable, by saying, page 561: "The claim of reasonableness cannot control us." In United States v. Trenton Potteries Co., U. S. Sup. Ct. 71 L. ed. 404, 407, this court cited the case of Johnson v. People, 72 Colo. 218 (under the same act), to the effect that the reasonableness of price levels established is not given consideration.

In the second place, the Colorado Anti-Trust Act does not apply any standard of criminality known to the common law. On the contrary, a new test or standard is set up which was unknown to the common law. There are no decisions furnishing any standard or test to determine what is a reasonable profit. It is one thing to determine whether a given course of action constitutes a reasonable restraint of trade, while it is quite another thing to determine whether or not a reasonable profit has been made.

In the third place, if there ever were any doubt upon the question, the recent decision of this court in United States v. Trenton Potteries Co., 71 L. ed. 404, has made it clear that the "rule of reason" has no application to price fixing agreements in prosecutions under the Sherman Act. There this court held that the trial judge correctly withdrew from the jury the consideration of the reasonableness of the price fixing agreements. And in so doing the court points out as a reason for its decision, the difficulties and uncertainties which arise in attempting to determine whether or not a reasonable price has been charged, referring to "so uncertain a test as whether prices are reasonable—a determination which can be satisfactorily made only after a complete survey of our economic organization and a choice between rival philosophies."

(c) The Nash Case.

The Nash case, 229 U. S. 373, cited by appellant, dealt with unfair trade practices and not with the problem of reasonable prices, and upheld the Sherman Act because it codified the common law offenses of engrossing, monopoly and restraint of trade, thereby furnishing an ascertainable standard of guilt for that kind of restraint of trade. Mr. Justice Holmes in that case referred to "the common law as to restraint of trade thus taken up by the statute," and in the later case of International Harvester Co. v. Kentucky, 234 U. S. 216, 223, in distinguishing the Nash case, he refers to the "great body of precedents on the civil side coupled with familiar practice." The same idea was expressed by Chief Justice White in United States v. Cohen Gro. Co., 255 U. S. 81, where, in discussing the Nash and Waters-Pierce Oil cases, he said: "For reasons found to result either from the text of the statutes involved or the subjects with which they dealt, a standard of some sort was afforded." And in Connally v. General Construction Co., 269 U. S. 385, 391, Mr. Justice Sutherland, in citing the Nash case, refers to "words or phrases having a technical or other special meaning * * * or a well settled common law meaning." There are no cases giving the words "reasonable profit" a "technical or other special meaning" or a "well settled common law meaning"; nor is there a "great body of precedents" nor "familiar practice" to guide the jury in determining what is a reasonable profit.

(d) The Waters-Pierce Case.

The Waters-Pierce Oil Company case, 212 U. S. 86, cited by appellant, is clearly in the same class as the Nash case, and as clearly distinguishable. The Texas Act contained no provision as to reasonableness. This court merely approved an instruction that the Act would be violated if

the activities of the defendants were reasonably calculated to come within its prohibitions. The Tozer case, 52 Fed. 917, and the Dey case, 35 Fed. 866, and The Louisville & Nashville Co. v. Ky., 99 Ky. 132 were there discussed by Mr. Justice Day, and he called attention to the fact that in all of them the acts were held invalid because "it rests with the jury to say whether a rate is reasonable and makes guilt depend not upon standards fixed by law," while, p. 109, "the Texas statutes in question do not give the broad power to a court or jury to determine the criminal character of the act in accordance with their belief as to whether it is reasonable or unreasonable as do the statutes condemned in the cases cited."

In Hygrade Provision Co. v. Sherman, 266 U. S. 497, cited by appellant, Mr. Justice Sutherland, at p. 502, points out that the term "kosher" "has a meaning well enough defined to enable one engaged in the trade to correctly apply it." The Hebrews have so applied it for centuries.

All of the cases cited by appellant are, therefore, entirely consistent with the principle for which we contend—all require that the Act shall furnish a definite test or standard of criminality which the Colorado Anti-Trust Act fails to do.

B.

THE COLORADO ANTI-TRUST ACT DENIES APPELLEES THE EQUAL PROTECTION OF THE LAWS.

The Colorado Anti-Trust Act (Appendix A), passed in 1913, contains prohibitions typical of such legislation. It declares to be against public policy, unlawful and void, a combination of two or more persons, corporations, or associations to create or carry out restrictions in trade or commerce, to increase or reduce the price of merchandise,

produce or commodities; to prevent competition in the manufacturing, making, transportation, sale or purchase of merchandise, produce or commodities; to fix any standard of figures whereby the price to the public of any article, commodity or product intended for sale or consumption in the state shall be in any manner controlled or established; to enter into any contract by which the parties shall bind themselves not to sell, manufacture or dispose of any article of trade, merchandise, commerce or consumption below a common standard figure or to keep the price at a fixed or graded figure, or by which they shall in any manner establish or settle the price of any article or commodity between themselves or themselves and others so as to preclude a free and unrestricted competition, or to pool, combine or unite any interest they may have in connection with the manufacture, sale or transportation of any article or commodity so that its price may in any manner be affected.

The Colorado Co-Operative Marketing Act (Appendix B), passed in 1923, exempts certain organizations from the operation of the Anti-Trust Act. It provides for the incorporation of co-operative associations to engage in the marketing or selling of agricultural products of its members. Agricultural products are defined to include horticultural, viticultural, forestry, dairy, livestock, poultry, bee and any farm products. Such associations are given power to engage in any activities in connection with the marketing, selling, preserving, harvesting, drying, processing, manufacturing, canning, packing, gathering, storing, handling or utilization of any agricultural products produced or delivered to it by its members or any activity in connection with the purchasing, hiring or use by its members of supplies, machinery or equipment, or in the financing of any such activities. Such an association may act as agent of its members in such activities and do everything neces-

sary or proper for the accomplishing of any of the purposes; may admit as members only persons engaged in the production of agricultural products to be handled by or through the association; may become a member of any other association organized under the law; may enter into marketing contracts between the association and its members requiring the members to sell for a period not over ten years, all or any specific part of their agricultural products or commodities exclusively to or through the association or any facilities to be created by the association. The by-laws or the marketing contract may fix specific sums as liquidated damages to be paid by a member to the association upon breach of any provision of the marketing contract regarding the sale or delivery or withholding of products. One association may organize, form, operate, own, control or have interest in any other such association, and any two or more associations may unite in using or may separately use the same personnel, methods, means and agencies for carrying on and conducting their business. Any law which is in conflict with the Act shall be construed as not applying to the associations provided for, and no association engaged under the Act (Section 29)

> "shall be deemed to be a conspiracy or a combination in restraint of trade or an illegal monopoly or an attempt to lessen competition or to fix prices arbitrarily, nor shall the marketing contracts and agreements between the association and its members or any agreements authorized in this act be considered illegal as such or in unlawful restraint of trade or as part of a conspiracy or combination to accomplish an improper or illegal purpose."

The Supreme Court of Colorado in Rifle Potato Grow-

ers Co-operative Assn. v. Smith, 78 Colo. 171, has held that the Co-operative Marketing Act controls or amends the Anti-Trust Act, saying at page 174, "It is objected that the contract is in restraint of trade and so void under the Colorado Anti-Trust law (C. L. 1921, Secs. 4036-43). But the Act of 1923, being the later act, controls the earlier." In Colorado Wheat Growers Association v. Thede, 253 Pac. 30, decided February 21st, 1927, the Colorado Supreme Court held that the Co-operative Marketing Act declared "a new public policy of the state" for any associations which comply with its terms. The Colorado Co-operative Marketing Act, therefore, as construed by the Colorado Supreme Court, has made an exception to the prohibitions of the Colorado Anti-Trust Act which permits marketing associations to combine to market or sell agricultural products. This privilege is denied to all other persons or associations engaged in business, trade or commerce in the State of Colorado.

A huge monopoly for marketing and selling food, a necessity of life, using any or all of the well known means of destroying trade and competition, raising prices, limiting production or engaging in unfair or ruthless trade practices (the Act imposes no restrictions whatever), would be legalized and given free rein, while all others engaged in trade or commerce including those dealing in other necessities, such as fuel and clothing, would at once be deemed criminals if they followed the same course.

As appellees are not, and could not be, members of such associations (Section 7), they are being prosecuted under a statute which denies them the equal protection of the laws. This court has so held in a case practically identical with the facts of the case at bar. In Connolly v. Union Sewer Pipe Company, 184 U. S. 540, this court held unconstitutional an Illinois Anti-Trust Act practically in the same

terms as the Colorado Act, because it violated the Fourteenth Amendment to the Constitution by denying certain persons the equal protection of the laws. Both the Illinois Act and the Colorado Act contain the same general prohibitions, and each exempted agricultural producers from its terms. The Illinois Act by its terms did not apply "to agricultural products nor livestock while in the hands of the producer or raiser", and the Colorado Act does not apply to associations marketing or selling "agricultural products", which are defined to include, amongst other things, livestock and farm products. The reasoning and illustration of Mr. Justice Harlan in the Connolly case are therefore peculiarly applicable here.

Referring to the Illinois Act, at page 556, Mr. Justice Harlan enumerated the ways in which agriculturalists and livestock raisers might combine and then said:

> "All this, so far as the statute is concerned, may be done by agriculturalists or livestock raisers in Illinois without subjecting them to the fine imposed by the statute. But exactly the same thing, if done by two or more persons, firms, corporations or associations of persons who shall have combined their capital, skill or acts in respect of their property, merchandise, or commodities held for sale or exchange, is made by the statute a public offense."

The same thing can be said of agriculturalists and livestock raisers in the State of Colorado under the Colorado Anti-Trust Act. As Judge Lewis stated in the decision of the lower court in this case (R. 43):

> "Nothing can be plainer than that these combinations authorized through the formation of the associations as provided for in the act would in

fact be combinations in restraint of trade and an attempt to lessen competition in the marketing of agricultural products. A declaration that they should not be so considered is as futile as a statement that white is black."

And at page 563, Mr. Justice Harlan said in the Connolly case:

"In prescribing regulations for the conduct of trade, it cannot divide those engaged in trade into classes and make criminals of one class if they do certain forbidden things, while allowing another and favored class engaged in the same domestic trade to do the same things with impunity. * * * It may be observed that if combinations of capital, skill, or acts, in respect of the sale or purchase of goods, merchandise or commodities, whereby such combinations may, for their benefit exclusively, control or establish prices, are hurtful to the public interests and should be suppressed, it is impossible to perceive why like combinations in respect of agricultural products and livestock are not also hurtful. Two or more engaged in selling dry goods, or groceries, or meats, or fuel or clothing, or medicines, are, under the statute, criminals, and subject to a fine, if they combine their capital, skill or acts for the purpose of establishing, controlling, increasing, or reducing prices, or of preventing free and unrestrained competition amongst themselves or others in the sale of their goods or merchandise; but their neighbors, who happen to be agriculturalists and livestock raisers, may make combinations of that character in reference to their

grain or livestock without incurring the prescribed penalty. Under what rule of permissible classification can such legislation be sustained as consistent with the equal protection of the laws?"

And at page 564 Mr. Justice Harlan summed up the decision by saying:

"We conclude this part of the discussion by saying that to declare that some of the class engaged in domestic trade or commerce shall be deemed criminals if they violate the regulations prescribed by the state for the purpose of protecting the public against illegal combinations formed to destroy competition and to control prices, and that others of the same class shall not be bound to regard those regulations, but may combine their capital, skill, or acts to destroy competition and to control prices for their special benefit, is so manifestly a denial of the equal protection of the laws that further or extended argument to establish that position would seem to be unnecessary."

The holding in the Connolly case has been repeatedly approved in subsequent decisions of this court. In Cox v. Texas, 202 U. S. 446, 450, Mr. Justice Holmes in discussing the Connolly case, said:

"Farmers and stock raisers are classes naturally existing in the community, carrying on distinct callings and not likely to be engaged in anything else. Hence, although farmers and stock raisers equally with others were prohibited from forming trusts for other purposes, to permit them

to form trusts in their regular business was practically and in fact to discriminate between two classes and others."

In Ozan Lumber Co. v. Union County Bank, 207 U. S. 251, 257, Mr. Justice Peckham referred to the Connolly case in the following language:

"The statute did not apply to agricultural products or livestock while in the hands of the producer or raiser. It was held that this exemption rendered the statute void, as denying to persons within the jurisdiction of the state the equal protection of the laws. The statute was held to create a classification of an arbitrary nature, applicable to large numbers of people, and yet not based upon any reasonable ground. * * * no valid reason could be given why, if one were included, the other should be exempted. The same reasons apply to all classes, and should have led to the same results with regard to all."

In International Harvester Co. v. Missouri, 234 U. S. 199, 215, Mr. Justice McKenna, after holding that that case did not come within the ruling in the Connolly case, said:

"If it did, we should of course apply that ruling here."

The Connolly case has also been cited with approval by this court many times, including, amongst others, the following: Otis v. Gassman, 187 U. S. 606, 610; Billings v. Illinois, 188 U. S. 97, 102; Missouri v. Dockery, 191 U. S. 165, 170; Dobbins v. Los Angeles, 195 U. S. 223, 236; Cook v. Marshall Co., 196 U. S. 261, 274; Halter v. Nebraska,

205 U. S. 34, 44; Continental Wall Paper Co. v. Louis Voight & Sons Co., 212 U. S. 227, 260; Singer Sewing Machine Co. v. Brickell, 233 U. S. 305, 315; Truax v. Corrigan, 257 U. S. 312, 335; Radice v. People of the State of New York, 264 U. S. 292, 296.

A careful examination of the decisions of this court bears out the statement made by Judge Anderson, in United States v. Armstrong, 265 Fed. 683, at 692, in citing the Connolly case: "No case has been called to my attention wherein the doctrine here laid down upon the question as to what is arbitrary classification has been modified."

The Connolly case has also been cited with approval by other courts where similar cases of classification had to be decided. See Brown v. Jacobs Pharmacy, 115 Ga. 429, 41 S. E. 553; State v. Cudahy Packing Co., 82 Pac. 833, 33 Mont. 179; State v. Waters-Pierce Oil Co., 67 S. W. 1057, where the Georgia, Montana and Texas Anti-Trust Acts with the same exemptions were held invalid. United States v. Armstrong, 265 Fed. 683, and United States v. Yount, 267 Fed. 861, where the Lever Act, which exempts farmers and co-operative associations of farmers, was held unconstitutional.

We submit that upon both reason and authority the Colorado Anti-Trust Act denies to appellees the equal protection of the laws, and fails to furnish an ascertainable standard of guilt.

II.

A FEDERAL COURT WILL ENJOIN THE ENFORCEMENT OF AN UNCONSTITUTIONAL STATE STATUTE WHERE PROPERTY RIGHTS ARE INVADED.

a. The inadequacy of the remedy at law.

We submit that the Colorado Anti-Trust Act is unconstitutional. The attempted enforcement of this act against appellees was destroying and seriously imperiling their existence and their valuable property rights.

The allegations of the bill are admitted by the motion to dismiss. They establish that each of the corporations involved had large property investments. (Frink Dairy Company over $125,000 (R. 16); Windsor Farm Dairy Company over $100,000 (R. 27); Climax Dairy Company over $100,000 (R. 29); and Beatrice Creamery Company over $200,000 (R. 23).) Each company had been in business for many years, had gained thousands of customers, and had built up a large and well established trade and had developed a reputation for fair dealing and a good will of great value (R. 3, 17, 23, 26, 29). The attempted enforcement of this Anti-Trust Act against appellees caused each of them to be held up to public contempt and ridicule, injured their good names, alienated their customers, and seriously injured their business and good will, all to their irreparable damage (R. 14, 17, 18, 23, 26, 29). The newspapers held appellees up to public condemnation, contempt and ridicule because of the activities of appellant (R. 30). Because of the prosecution by appellant, the gross sales of one of the appellee companies in the month of the prosecution were over $6,000 less than the preceding month, and the business was carried on at a loss of over $2,500 for

that month (R. 17). The very existence of the different companies was threatened (R. 17, 23, 26, 29). Appellant was at the time summoning witnesses before the Grand Jury which was then in session, questioning them about the business of appellees, and threatening to institute further prosecutions, and attempting to get further indictments against appellees (R. 10). Last and most of all, appellant stated that it was his purpose and intention to institute proceedings to forfeit the charters, rights and franchises of appellees (R. 11, 16, 23, 26, 29), which he was authorized and directed under the terms of the act to do (R. 5). He was conducting a campaign by criminal prosecutions well calculated to destroy the business and the property of the appellees—all on the basis of an unconstitutional and void statute. The situation was exceptional and extraordinary.

The facts demanded extraordinary relief. Appellees had no adequate remedy at law, in the state courts of Colorado. The trial judge before whom the prosecution was pending had denied the motions to quash and refused further hearings requested by appellees to present authorities as to the unconstitutionality of the act (R. 20). Appellees, therefore, faced a long and expensive trial to a jury in the state court; if found guilty, then the preparation of a voluminous and costly record for the Supreme Court of Colorado; if unsuccessful there, then the further expense and delay of an appeal to this court. If found guilty, Sections 3 and 4 of the Act (R. 5) provided that the charters, rights and franchises of appellees should be forfeited and the corporations dissolved. By Section 6 of the Act (R. 6) their contracts would be absolutely void and the violation of the Act would be a defense in any suit they might bring to protect their rights or recover from their debtors. And by Section 7 of the Act (R. 6) they could be sued for damages.

and the finding of the jury would be used to establish such a cause of action. The decision of the lower court (R. 46) aptly describes the predicament of appellees:

"The pleadings here and affidavits in support disclose that the State District Judge overruled motions to quash the information, declined to hear further argument from defendant's counsel in that case on the unconstitutionality of the State Anti-Trust Act, and has set that case down for trial at an early date. Under the State practice defendants in a criminal case cannot be heard in the State Supreme Court until after conviction, and the removal of their case to that court after the happening of that event, and putting it in condition to be finally heard there, requires time, frequently extended by unexpected delays. We are further informed by the proof that the record in that case will necessarily be voluminous. The four corporate defendants are jointly charged; their books and records will become competent proof in arriving at the question as to what are reasonable prices and profits for their products, which will involve a full investigation of the business of each company and require expert testimony. Such a record cannot be put in shape for the appellate court until after the lapse of many months. In the meantime the Act prohibits them from transacting any business in the State of Colorado. A verdict of guilty will be conclusive proof that they have violated the State Anti-Trust Act. It will also be conclusive proof in a suit to forfeit their rights and franchises and dissolve them, and a good defense in actions they may bring against their debtors. Under the charges

made in the bill it therefore seems clear that further prosecution of the pending information is but a step in the invasion of their property rights, and if continued those rights will be wholly destroyed under an invalid law."

The remedy at law was wholly inadequate to protect the property rights involved. It was a remedy which could not be availed of on the law side of the Federal Court and therefore was an occasion requiring the assistance of a Federal Court of Equity. Risty v. Sioux Falls, 270 U. S. 378; Terrace v. Thompson, 263 U. S. 197, 214.

This court has repeatedly decided that equitable jurisdiction exists to restrain criminal prosecutions under unconstitutional enactments when necessary to safeguard the rights of property. Tyson Bros. v. Banton, 71 L. ed. 483; Packard v. Banton, 264 U. S. 140; Terrace v. Thompson, 263 U. S. 197; Truax v. Raich, 239 U. S. 33; Philadelphia v. Stimson, 223 U. S. 605; Ex Parte Young, 209 U. S. 123; Dobbins v. Los Angeles, 195 U. S. 223; Davis & Farnum v. Los Angeles, 189 U. S. 207; Reagan v. Farmers Loan & Trust Co., 154 U. S. 362. The basic reason for the relief given in all of these cases was that property rights were being destroyed or threatened, and there was no adequate remedy in the State court to protect these property rights.

Appellees found themselves in a more precarious situation than that described by Mr. Justice Holmes in Oklahoma Natural Gas. Co. v. Russell, 261 U. S. 290, 293: "They are suffering daily from confiscation under the rate to which they are now limited. They have done all that they can under the State law to get relief and cannot get it. If the Supreme Court of the State hereafter shall change the rate even nunc pro tunc, the plaintiffs will have no adequate remedy for what they have lost before the court shall have

acted. * * * *Rules of comity or convenience must give way to constitutional rights*". (Italics ours.)

Appellant admits at page 9 of his brief that the Federal Court may enjoin threatened prosecutions but he argues that they can give no relief where a prosecution is pending in the State court. This distinction is unsound and is not borne out by the decisions of this court. In Davis & Farnum v. Los Angeles, 189 U. S. 207, arrests had been made under an invalid ordinance, and in answering the contention made by appellant here, Mr. Justice Brown said, at page 218:

> "*It would seem that if there were jurisdiction in a court of equity to enjoin the invasion of property rights through the instrumentality of an unconstitutional law, that jurisdiction would not be ousted by the fact that the state had chosen to assert its power to enforce such law by indictment or other criminal proceeding.* Springhead Spinning Co. v. Riley, L. R. 6 Eq. 551, 558." (Italics ours.)

In the Springhead Spinning Company case there cited with approval, the Vice-Chancellor at page 558 says: "The jurisdiction of this court is to protect property and it will interfere to stay any proceedings, whether connected with crime or not, which go to the immediate or tend to the ultimate destruction of property or to make it less valuable for use or occupation." And in Dobbins v. Los Angeles, 195 U. S. 223, arrests had been made under an invalid ordinance and the plaintiff filed a bill to enjoin the further prosecution in the State courts. This court held that the demurrer to the bill should have been overruled, stating at page 241:

> "*It is also urged by the defendants in error that a court of equity will not enjoin prosecution of*

a criminal case; but, as we have seen, the plaintiff in error in this case had acquired property rights, which, by the enforcement of the ordinance in question, would be destroyed and rendered worthless. If the allegations of the bill be taken as true, she had the right to proceed with the prosecution of the work without interference by the city authorities in the form of arrest and prosecution of those in her employ. *It is well settled that, where property rights will be destroyed, unlawful interference by criminal proceedings under a void law or ordinance may be reached and controlled by a decree of a court of equity.* Davis & Farnum Mfg. Co. v. Los Angeles, 189 U. S. 207-218, and cases therein cited."

These decisions have been repeatedly cited with approval by this court. Packard v. Banton, 264 U. S. 140; Terrace v. Thompson, 263 U. S. 197; Truax v. Raich, 239 U. S. 33; Philadelphia v. Stimson, 223 U. S. 605.

Appellant cites no case, and there is none, where this court has held that such relief could not be given where property rights were being invaded and a prosecution was pending under an unconstitutional law. As the trial court well said (R. 47, 48):

"In most of these cases the legislation under consideration was sustained as valid, the prosecutions were only threatened, not pending, and there was no occasion to determine the point now in mind, it was not passed on. Where a criminal prosecution results directly in the invasion and destruction of property rights, we do not doubt that it is within the power and duty of a court of equity

to enjoin the administrative officer who has charge of the prosecution if there be no valid law on which the accusation rests. The claimed difference, under those conditions, between pending and threatened cases is, in our judgment, without substance. We venture to say, on the authority of the Davis & Farnum case, that it can make no difference, on the question of jurisdiction when prosecution is begun under an invalid law, whether before or after a bill is exhibited, if there be an unlawful invasion by virtue thereof of property rights."

On principle, the pendency of a suit in the state court should not be, and is not, the determining factor. The fundamental inquiry to be made is whether or not property rights are being invaded and whether the remedy in the state court is adequate. Property rights are as likely to be destroyed, and in most instances more so, where a suit is pending than where it is merely threatened. This was the case of appellees, as the record shows that after the prosecution was started their business was rapidly being dissipated and destroyed. The appellant as District Attorney would, under the terms of the act, if a verdict of guilty was obtained, proceed to forfeit the charters of appellees. The right of the Federal Court to give relief should not depend upon a race between the prosecuting officer and the accused to see who can first get into court.

b. Appellant's cases distinguished.

In none of the cases cited by appellant in his brief, pages 7-9, were the facts at all similar to those of the case at bar. Under subdivision (2) on page 7 he cites numerous civil cases which, in their very nature, could not be applicable to a criminal prosecution, and in none of them

was there an unconstitutional statute involved, and in none of them were property rights being invaded. In Essanay Film Mfg. Co. v. Kane, 258 U. S. 358, cited by appellant, Mr. Justice Pitney, at page 362, points out that the case "presented no exceptional feature." A suit for damages had been brought against an Illinois corporation in New Jersey, and the defendant had allowed the case to go by default. The defendant there clearly had an adequate remedy by defending the suit and appealing to the higher court. Such facts presented no exceptional feature requiring equitable relief. In Hull v. Burr, 234 U. S. 712, cited by appellant, the court points out at page 723 that Section 265 was not intended to limit the powers of the Federal Court to enforce its authority in cases within its proper jurisdiction. In Parcher v. Cuddy, 110 U. S. 472, Chief Justice Waite recognizes that an injunction may be granted where the reasons are imperative.

The criminal cases cited by appellant in subdivision b, page 8 of his brief, are in accord with our position. In Fenner v. Boykin, ... U. S. ......, 70 L. ed. 559, cited by appellant, there was no unconstitutional act involved and there was no necessity for the relief asked. The court there recognized that relief would be granted in "extraordinary circumstances where the danger of irreparable loss is both great and immediate" and where the remedy in the state courts is inadequate. In in re Sawyer, 124 U. S. 200, a city officer charged with malfeasance in office sought to enjoin the mayor from removing him. No suit was pending. There was no question of an unconstitutional act involved, but the court at pages 213 and 217 is careful to point out that the jurisdiction to restrain the action of the state court rests upon injury to property, whether actual or prospective, and the inference is clear that where property rights are involved, that the court will

give relief. Harkrader v. Wadley, 172 U. S. 148, cited by appellant, was a habeas corpus case. Mr. Justice Shiras points out, at pages 163, 164 and 167, that the validity and constitutionality of the law in question was not assailed. In Fitts v. McGhee, 172 U. S. 516, cited by appellant, no prior suit was pending, and the court held that it would not give relief as the suit would be in effect against the state; but this case has in effect been overruled by the later authorities which hold that such a suit is not against the state. Appellant also cites Story, Commentaries on Equity Jurisprudence. Section 1217 of the 14th edition is as follows: "Courts of equity will issue the writ of injunction to restrain the threatened injury to property rights, but if it appears that the criminal act does not affect property rights, the injunction will not issue."

Ex Parte Young, 209 U. S. 123, 162, is cited by appellant. Here an injunction was *granted* restraining the Attorney General of Minnesota from proceeding under an unconstitutional law. The language at page 162, relied upon by counsel, is at best, dictum as there was no pending suit. In addition, neither of the two following cases cited by the court in support of this dictum, support it. Taylor v. Taintor, 16 Wall. 366, 370, was not a case of a prior suit where an unconstitutional statute was involved. It merely states the well recognized principle that once jurisdiction attaches, that jurisdiction continues until final relief is given. We have already shown that Harkrader v. Wadley, the other case cited to this dictum, is no authority for such contention. This dictum is entirely inconsistent with the decisions in Davis & Farnum v. Los Angeles, and Dobbins v. Los Angeles, above referred to.

c. Section 265 of the Judicial Code.

Appellant says that Section 265 of the Judicial Code prohibits the granting relief where a suit is pending. This Section makes no such distinction. Its prohibition is against staying "proceedings in any court of a state" and it is not further qualified by the words "pending" or "threatened." The phrase "proceedings in any court of a State" within the meaning of this Section, covers "proceedings" that are threatened and about to be brought in a court of a State, as well as "proceedings" pending in any court of a State. Both are "proceedings" in any court of a State. If this section were literally applied, no injunction would ever issue out of a federal court to restrain a proceeding in a state court, whether threatened or pending. But it is not and never has been literally applied. There are many authorities cited above where this court has upheld the staying of threatened prosecutions. The reason for this is found in the fact that Section 265 is merely a statutory rule of comity and has not been literally enforced, and where necessity has required in many instances, it has given way to the application of injunctive relief by the federal courts. As said in Wells Fargo v. Taylor, 254 U. S. 175, 183:

> "It is intended to give effect to a familiar rule of comity and, like that rule, is limited in its field of operation. Within that field it tends to prevent unseemly interference with the orderly disposal of litigation in the state court and is salutary, but to carry it beyond that field would materially hamper the federal courts in the discharge of duties otherwise plainly cast upon them by the Constitution and the laws of Congress, which, of course, is not contemplated."

In Smith v. Apple, 264 U. S. 274, this court held that

Section 265 is not jurisdictional but merely a limitation on the equity powers of the federal court. In the following instances the federal courts have found it necessary to act and this section has not prevented the granting of relief. In Madisonville Traction Co. v. St. Bernard Mining Co., 196 U. S. 239, it was held not to apply where a case has been properly removed from a state court to a federal court. The federal court will enjoin further proceedings in the state court; otherwise the right of removal would be an empty form. In actions in rem if the federal court first acquires jurisdiction, it will enjoin a later state court proceeding affecting the res. Kline v. Burke Construction Co., 260 U. S. 226; Covell v. Heyman, 111 U. S. 176. The federal court will enjoin the enforcement of a judgment obtained in the state court by fraud or mistake. Marshall v. Holmes, 141 U. S. 589; or the enforcement of a judgment of a state court which is void. Simon v. Southern Ry., 236 U. S. 115. A federal court will restrain a state court from disposing of crops in order to protect rights of the federal government, United States v. Inaba, 291 Fed. 416. In Prentis v. Atlantic Coast Line Co., 211 U. S. 210, and Public Service Co. v. Corboy, 250 U. S. 153, Section 265 was held not to apply to the exercise of legislative functions of state courts in pending proceedings.

Furthermore, the "proceeding" referred to by Section 265 is a valid and constitutional proceeding. Simon v. Southern Ry. 236 U. S. 115. As appellant was attempting to act under an unconstitutional and illegal statute, the prosecution in question was not a "proceeding" within the meaning of the Section. The Anti-Trust Act specifically charged appellant with a duty to prosecute its violators. As the act is invalid, the authority so given him is invalid and appellant had no authority or legal right to do what he was attempting to do, and the federal court was not ousted

of jurisdiction because he asserted such authority. As said in Reagan v. Farmers Loan & Trust Co., 154 U. S. 362, 391, the "court is not ousted of jurisdiction because he *asserts* authority as such officer. To make out his defense he must show that his authority was sufficient in law to protect him." And as said by Mr. Justice Hughes in Philadelphia v. Stimson, 223 U. S. 605, 621: "Where an officer is proceeding under an unconstitutional act, its invalidity suffices to show that he is without authority and it is this absence of lawful power and his absence of authority in imposing or enforcing in the name of the state unwarrantable actions or restrictions to the irreparable loss of the complainant, which is the basis of the decree."

By the admitted facts (R. 21), the judge of the state court stated that he would be pleased if the federal court took jurisdiction and decided the question as to the unconstitutionality of the Act. No rule of comity could be violated in view of such consent, and approval by the State court of the course pursued. There was no attempt here to restrain the court or the jury but only an individual who was proceeding without authority and in violation of constitutional principles. As said by Mr. Justice Hughes in Philadelphia v. Stimson, 223 U. S. 605, 621: "In this there is no attempt to restrain a court from trying persons charged with crime nor the Grand Jury from the exercise of its functions, but the injunction binds the defendant not to resort to criminal proceedings to enforce illegal demands."

III

UNDER THE ISSUES MADE BY THE PLEADINGS, THE RIGHT TO ENJOIN THE PENDING PROCEEDING IS NOT BEFORE THE COURT.

The appellant filed a motion to dismiss under Equity Rule 29, directed to the whole, and not to any particular part, of the bill. When this was denied he refused to plead further and elected to stand upon his general motion to dismiss, (R. 33). The only question for this court to decide, therefore, is whether or not the motion to dismiss was properly denied. If the bill stated a cause of action for equitable relief, there was no error in the decision of the lower court, and it should be affirmed.

The motion to dismiss under Equity Rule 29 was substituted for the demurrer under the former practice. Connally v. General Construction Co., 269 U. S. 385, 391; General Inv. Co. v. Lake Shore & Mich. So. Ry. Co., 250 Fed. 160, 172.

It is well settled that a motion to dismiss must be denied or a general demurrer must be overruled where a good cause of action for equitable relief is stated. Livingston v. Storey, 9 Peters, 632, 658:

> "And if any part of the bill is good and entitles the complainant either to relief or discovery, a demurrer to the whole bill cannot be sustained."

Pacific Railroad Co. v. Missouri Pacific, 111 U. S. 509, 520: "The demurrers in this case are to the whole bill. If any part of the bill is good the demurrers fail."

Stewart v. Masterson, 131 U. S. 151, 158. "In addition to this as there is matter properly pleaded in the amended bill and properly ground for equitable relief which

requires an answer or a plea, and as the demurrer is to the whole bill, it ought to have been overruled."

Tilden v. Barbour, 227 Fed. 1010: "Under Rule 29 the pleading cannot be disposed of on motion unless there is an insufficiency of fact to constitute a valid cause of action in equity." Southern Bell Tel. & Tel. Co. v. Railroad Commission, 280 Fed. 901, 905; Commodores Point Terminal Co. v. Hudnall, 283 Fed. 150, 163; Board of Levy Commissioners v. Tensas Delta Land Co., 204 Fed. 736, 740.

Assuming the unconstitutionality of the Anti-Trust Act, the bill stated a cause of action for equitable relief against the appellant because of his threatened activity under the Act. Paragraphs X and XI of the bill (R. 10, 11) allege that the appellant was summoning witnesses before the Grand Jury which was then in session, questioning them with reference to the business of appellees, with the view of obtaining indictments of appellees under the Anti-Trust Act, was threatening further prosecution of the appellees and threatening to enforce the penalties under said Act by the institution of proceedings to forfeit the charters, rights and franchises of appellees. The motion to dismiss admits these allegations.

Appellant at page 9 of his brief admits that a court of equity will enjoin a threatened prosecution under an unconstitutional law. We have cited at page 25 of this brief the cases on the right to enjoin the enforcement of an unconstitutional law. We should not be understood as admitting in this argument that the lower court could not enjoin the district attorney from prosecuting the pending proceeding.

We therefore submit that as the bill stated a cause of action for relief against the threatened activities of appellant, there was no error in the lower court's denial of the motion to dismiss. The further question of whether or not

the lower court should enjoin the district attorney from prosecuting the pending criminal proceeding was not an issue raised by the general motion to dismiss and is not a question to be determined by this court upon appeal.

SUMMARY.

We respectfully submit that the Colorado Anti-Trust Act is unconstitutional. It violates Article XIV of the Amendments to the Constitution of the United States for two reasons:

(a) It is lacking in due process, as it is indefinite, and fails to fix an ascertainable standard of guilt.

(b) It denies to the appellees the equal protection of the law; it exempts from its operation farmers and co-operative marketing associations.

The lower court was confronted with this situation, set out in the bill: appellees' property rights were invaded, their business being destroyed, their existence threatened by unauthorized prosecutions under this Act. The remedy at law was wholly inadequate. Appellant moved to dismiss for want of equity. The court held that the bill stated a cause of action for injunction, denied the motion, and protected appellees' property rights in this extraordinary situation. Appellant stood on his motion and refused to plead further. We submit that the decisions of this court support the lower court, that there was no error, and the decision of the lower court should be affirmed.

Respectfully submitted,

A. J. FOWLER,
ERNEST B. FOWLER,
Solicitors for Appellees,
FRINK DAIRY COMPANY,
CLARENCE FRINK AND
A. T. McCLINTOCK.

APPENDIX A

THE COLORADO ANTI-TRUST LAW (SESSION LAWS 1913 CHAPTER 161, PAGE 613— SECTIONS 4036 TO 4043, INCLUSIVE, COMPILED LAWS, 1921)

Section 1. A trust is a combination of capital, skill or acts, by two or more persons, firms, corporations, or associations of persons, or by any two or more of them, for either, any or all of the following purposes:

First. To create or carry out restrictions in trade or commerce, or aids to commerce, or to carry out restrictions in the full and free pursuit of any business authorized or permitted by the laws of this State.

Second. To increase or reduce the price of merchandise, produce or commodities.

Third. To prevent competition in the manufacturing, making, transportation, sale or purchase of merchandise, produce, ores, or commodities, or to prevent competition in aids of commerce.

Fourth. To fix any standard of figures, whereby the price to the public of any article or commodity of merchandise, produce or commerce intended for sale, use or consumption in this State shall, in any manner, be controlled or established.

Fifth. To make or enter into, or execute or carry out, any contract, obligation or agreement of any kind or description by which they shall bind or have to bind themselves not to sell, manufacture, dispose of or transport any article or commodity, or article of trade, use, merchandise, commerce or consumption below a common standard figure; or by which they shall agree in any manner to keep the price of such article, commodity or transportation at a fixed or graded figure; or by which they shall in any manner establish or settle the price of any article or commodity or

transportation between them or themselves and others so as to preclude a free and unrestricted competition among themselves or others in transportation, sale or manufacture of any such article or commodity; or by which they shall agree to so pool, combine or unite any interest they may have in connection with the manufacture, sale or transportation of any such article or commodity, that its price may in any manner be affected.

And all such combinations are hereby declared to be against public policy, unlawful and void; provided that no agreement or association shall be deemed to be unlawful or within the provisions of this act, the object and purposes of which are to conduct operations at a reasonable profit or to market at a reasonable profit those products which cannot otherwise be so marketed; provided further that it shall not be deemed to be unlawful, or within the provisions of this act, for persons, firms, or corporations engaged in the business of selling or manufacturing commodities of a similar or like character to employ, form, organize or own any interest in any association, firm or corporation having as its object or purpose the transportation, marketing or delivering of such commodities; and provided further that labor, whether skilled or unskilled, is not a commodity within the meaning of this act.

Section 2. It shall be lawful to enter into agreement or form associations or combinations, the purpose and effect of which shall be to promote, encourage or increase competition in any trade or industry, or which are in furtherance of trade.

Section 3. For a violation of any of the provisions of this act by any corporation, or by any of its officers or agents mentioned herein, it shall be the duty of the attorney general of this State, or district attorney of any district in which said violation may occur, or either of them upon his

own motion to institute an action in any court of this State having jurisdiction thereof for the forfeiture of the charter, rights and franchise of such corporation, and the dissolution of its existence.

Section 4. Every foreign corporation, as well as every foreign association, exercising any of the powers, franchises, or functions of a corporation in this State, violating any of the provisions of this act, is hereby denied the right and it shall be the duty of the Attorney General to enforce this provision by bringing proper proceedings by injunction or otherwise.

Section 5. Each and every person, company or corporation, the officers, agents or representatives thereof, violating any of the provisions of this act shall be deemed guilty of a misdemeanor, and on conviction thereof shall be subject to a fine of not more than one thousand dollars, or to imprisonment for not more than six months; and it shall be the duty of the Attorney General of the State, or the district attorney of any district in the State, in which said violation shall occur, or either of them, to prosecute and enforce the provisions of this act.

Section 6. Any contract or agreement in violation of any of the provisions of this act shall be absolutely void; and when any civil action shall be commenced in any court of this State it shall be lawful to plead in defense thereof that the cause of action sued upon grew out of a contract or agreement in violation of the provisions of this act.

Section 7. That any person, firm, company or corporation that may be damaged by any such agreement, trust or combination described in Section 1 of this act, may sue for and recover in any court of competent jurisdiction in this State, of any person, company or corporation operating such trust or combination, such damages as may have been thereby sustained.

APPENDIX B

RELEVANT PARTS OF THE COLORADO CO-OPERATIVE MARKETING LAW.

(Colorado Session Laws, 1923, Chapter 142, Page 420)

Section 1. (a) In order to promote, foster and encourage the intelligent and orderly marketing of agricultural products through co-operation; and to eliminate speculation and waste; and to make the distribution of agricultural products between producer and consumer as direct as can be efficiently done; and to stabilize the marketing of agricultural products and to provide for the organization and incorporation of co-operative marketing associations for the marketing of such products, this Act is passed.

Section 2. As used in this Act.

(a) The term "agricultural products" shall include horticultural, viticultural, forestry, dairy, live stock, poultry, bee and any farm products.

Section 3. Eleven (11) or more persons, a majority of whom are residents of this State, engaged in the production of agricultural products, may form a non-profit, co-operative association, with or without capital stock, under the provisions of this Act.

Section 4. An association may be organized to engage in the marketing or selling or in any activity in connection with the marketing or selling of the agricultural products of its members, or with the harvesting, preserving, drying, processing, canning, packing, grading, storing, handling, shipping or utilization thereof, or the manufacturing or marketing of the by-products thereof; or in connection with the manufacturing, selling or supplying to its members of machinery, equipment or supplies; or in the financing of the above enumerated activities; or in any one or more of the activities specified herein.

Section 6. Each association incorporated under this Act shall have the following powers:

(a) To engage in any activity in connection with the marketing, selling, preserving, harvesting, drying, processing, manufacturing, canning, packing, grading, storing, handling or utilization of any agricultural products produced or delivered to it by its members, or the manufacturing or marketing of the by-products thereof; or any activity in connection with the purchase, hiring or use by its members of supplies, machinery or equipment; or in the financing of any such activities; or in any one or more of the activities specified in this section. Any association in its option may limit itself in its articles of incorporation to the handling of products of its members only, or it may in its articles assume the right to handle the products of non-members, but, in such event, the association shall not handle for non-members a volume of products greater in the aggregate than the aggregate of products handled by it for its own members.

Section 7. (a) Under the terms and conditions prescribed in the by-laws adopted by it, an association may admit as members, (or issue common stock to), only persons engaged in the production of the agricultural products to be handled by or through the association, including the lessees and tenants of land used for the production of such products and any lessors and landlords who receive as rent all or any part of the crop raised on the leased premises.

(c) One association organized hereunder may become a member or stockholder of any other association or associations organized hereunder.

Section 18. The association and its members may make and execute marketing contracts, requiring the members to sell, for any period of time, not over ten years, all or any specified part of their agricultural products or specified

commodities exclusively to or through the association, or any facilities to be created by the association. If they contract a sale to the association, it shall be conclusively held that title to the products passes absolutely and unreservedly, except for recorded liens, to the association upon delivery; or at any other specified time if expressly and definitely agreed in the said contract. The contract may provide, among other things, that the association may sell or resell the products delivered by its members, with or without taking title thereto; and pay over to its members the re-sale price, after deducting all necessary selling, overhead and other costs and expenses, including interest or dividends on stock, not exceeding eight (8) per cent per annum, and reserves for retiring the stock, if any; and other proper reserves.

Section 19. (a) The by-laws or the marketing contract may fix, as liquidated damages, specific sums to be paid by the members or stockholders to the association upon the breach by him of any provision of the marketing contract regarding the sale or delivery or withholding of products; and may further provide that the member will pay all costs, premiums for bonds, expenses and fees, in case any action is brought upon the contract by the association; and any such provisions shall be valid and enforceable in the courts of this State; and such clauses providing for liquidated damages shall be enforceable as such and shall not be regarded as penalties.

(b) In the event of any breach or threatened breach of such marketing contract by a member, the association shall be entitled to an injunction to prevent the further breach of the contract and to a decree of specific performance thereof. Pending the adjudication of such an action and upon filing a verified complaint showing the breach or threatened breach, and upon filing a sufficient bond, the as-

sociation shall be entitled to a temporary restraining order and preliminary injunction against the member.

Section 22. Any provisions of law which are in conflict with this Act shall be construed as not applying to the associations herein provided for.

Any exemptions whatsoever under any and all existing laws applying to argicultural products in the possession or under the control of the individual producer, shall apply similarly and completely to such products delivered by its members, in the possession or under the control of the association.

Section 29. No association organized hereunder and complying with the terms hereof shall be deemed to be a conspiracy or a combination in restraint of trade or an illegal monopoly; or an attempt to lessen competition or to fix prices arbitrarily nor shall the marketing contracts and agreements between the association and its members or any agreements authorized in this Act be considered illegal as such or in unlawful restraint of trade or as part of a conspiracy or combination to accomplish an improper or illegal purpose.

SUBJECT INDEX

CASES CITED

A

B

C

D

E

F

H

I

K

L

STATUTES AND RULES CITED

No. 31719

IN THE

Supreme Court of the United States

OCTOBER TERM, 1926.

FOSTER CLINE, as District Attorney for the City and County of Denver, State of Colorado, *Appellant,* vs. FRINK DAIRY COMPANY, THE WINDSOR FARM DAIRY COMPANY, THE CLIMAX DAIRY COMPANY, Et al, *Appellees.*	No. 304

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLORADO.

BRIEF OF THE WINDSOR FARM DAIRY COMPANY AND H. BROWN CANNON, Appellees.

THE TRIAL COURT'S OPINION

The opinion of the trial court rendered in the case at bar, will be found reported in full, entitled *Beatrice Creamery Company v. Cline*, in 9 Fed. (2nd) 176, and also at pages 37-50 of the record.

JURISDICTION OF THE COURT

The purpose of the complaint is to have declared unconstitutional, as violating the Fourteenth Amendment to the Constitution of the United States, the so-called Anti-Trust Act of the State of Colorado, set out in full in the complaint. (R. 3-6.)

The jurisdictional amounts are clearly averred in the complaint, (R. 2) and supported by affidavits (R. 15, 20, 22, 25 and 28). The final decree was entered in the trial court on December 14th, 1925. (R. 33.) The appeal is here by virtue of Section 266 of Judicial Code. The jurisdiction of this Court in such matters is so thoroughly established that further citation of authority is deemed unnecessary.

CORRECTIONS AND ADDITIONS TO APPELLANT'S STATEMENT OF THE CASE.

No appeal is taken from the interlocutory injunction, as erroneously stated by appellant at page 5 of his brief, but only an appeal from the final decree. (R. 34.)

By stipulation, affidavits of witnesses and the documents as filed and considered by the Court upon the hearing for interlocutory injunction, were considered by the Court in rendering the final decree. (R. 33).

The complaint as amended, specifically alleges the violation of the due process and equal protection clause of the Fourteenth Amendment to the Constitution of the United States, by the Colorado Anti-Trust Act. (R. 7).

Amendment to complaint alleged that the trial Judge of the State District Court had overruled and denied the unconstitutionality of the Statute, had refused to hear further argument, that under State procedure appellees were not permitted to appeal to the State Supreme Court to review the decision of the trial Judge until after the case had been tried to a jury; that such trial would entail upon appellees vexatious burdens, requiring them to produce and exhibit in Court, their private records and documents,

trade methods, trade secrets, methods of conducting business, prices they were required to pay for products, wages paid employees; expose them to public ridicule and contempt; injure their good name; destroy their business, alienate their customers and cause irreparable damage. (R. 14).

That the prosecution, whether successful or not, had, and would continue to have, the effect of destroying the good will, greatly diminishing the amount of business and threaten the very life and existence of the appellee corporations. That the loss to the Frink Dairy Company alone for the month of September, 1925, was more than $6,000.00. Appellees are unable to hold and maintain their former business (R. 17). That if the Anti-Trust Statute is held valid, appellees cannot in future follow their business in a free and unhampered manner. (R. 19).

The State District Judge rather invited the Federal Court to assume jurisdiction and determine the constitutionality of the Statute. (R. 21.)

Appellant avowed it his purpose and intention of instituting other proceedings and prosecutions and of taking action to forfeit the charters of appellee corporations (R. 23 and 26).

That the pending action and threatened actions of appellant have greatly lessened the value of the stock of The Windsor Farm Dairy and if continued will lessen and eventually destroy the value of the stock; that to continue the prosecution, whether successful, or unsuccessful, would lessen the value of the stock owned by appellee, Cannon, in a sum in excess of $25,000.00 (R. 27).

THE ARGUMENT.

I.

SUMMARY OF THE ARGUMENT.

The Colorado Anti-Trust Law, as amended by the Colorado Marketing Act and construed by the Supreme Court of the State of Colorado in *Rifle Association v. Smith*, 78 Colo. 171 violates the due process and equal protection clause of the Fourteenth Amendment to the Constitution of the United States, because:

(a) It furnishes no ascertainable standard of guilt as measured by the principles announced in the decisions of the United States Supreme Court construing the Lever Act and more recently in the case of *Connolly v. Gen. Construction Co.* 269 U. S. 385.

(b) It exempts from its provisions combinations gathering, owning, purchasing or dealing in agricultural products, and thereby denies to appellees the equal protection of the laws, as has been so clearly pointed out by this Court in the case of *Connolly v. Union Sewer Pipe Company*, 184 U. S. 540.

The Colorado Anti-Trust Act being unconstitutional, and its enforcement having the effect of destroying valuable property rights of appellees, the Court had the power, and it was its duty to grant appellees injunctive relief.

(a) It was proper to enjoin appellant from instituting further civil and criminal proceedings to enforce the statute and from instituting civil actions to forfeit the charters of appellee corporations.

(b) Appellant filed his motion to dismiss in the nature of a general demurrer, that motion was overruled, he declining to plead further, the final decree was taken as confessed, the averments of the complaint entitled appellees to some measure of relief. Therefore, the question as to whether the Court had power to enjoin a pending prosecution, incidental to the main relief sought, was not properly raised in the trial Court and is not here for review.

(c) The Court had power and it was its duty to en-

join a pending prosecution incidental to the main relief sought, that of declaring the Colorado Anti-Trust Act unconstitutional, where, as here, no further relief could be obtained in the State Court by appeal or otherwise, without the infliction of great and irreparable damage to appellees.

II.

THE COLORADO ANTI-TRUST ACT IS UNCONSTITUTIONAL.

The act as amended and limited by the Colorado Marketing Act is unconstitutional and void because it violates the due process and equal protection clause of the Fourteenth Amendment to the Constitution of the United States, in that,

(a) It furnishes no ascertainable standard of guilt, and

(b) Organizations harvesting, marketing or dealing in agricultural products are exempt from it provisions.

The Anti-Trust Act and the Marketing Act are lengthy documents. They will be found as "Appendix A" and "Appendix B" to Appellant's Brief. It would serve no good purpose to reproduce them in this brief. Their salient features will be referred to as the argument proceeds.

1. THE COLORADO ANTI-TRUST LAW IS UNCONSTITUTIONAL BECAUSE IT VIOLATES THE DUE PROCESS AND EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT IN THAT IT DOES NOT FURNISH AN ASCERTAINABLE STANDARD OF GUILT.

The Colorado Anti-Trust Act in effect defines a trust as being a combination of capital, skill or acts affecting operations in a number of ways. It then provides that "no

agreement or association shall be deemed to be unlawful or within the provisions of this act, the object and purposes of which are to conduct operations at a reasonable profit." To state the matter differently, all such combinations and agreements are valid if the object and purposes are to conduct operations at a reasonable profit, and invalid and inhibited if the object and purposes are to conduct operations at an unreasonable profit. The penalty for violating the act is a fine and imprisonment, and in case of a corporation, the forfeiture of its charter. (Anti-Trust Act, p. 26 Appellant's Brief).

It is submitted that the ultimate object of any and every monopoly is to conduct operations at a profit. Every combination inhibited by the Anti-Trust Act must have for its ultimate purpose the conduct of "operations" of some kind. "Restrictions in trade" would have such a purpose, "increase or reduced prices" the same, "to prevent competition" the same purpose, "to fix a standard of figures" clearly so, to divided territory could have no other ultimate purpose. If such "operations" have for their ultimate purpose the making of "a reasonable profit" under the terms of this statute, they are lawful; if of making more than a reasonable profit, they are criminal.

It is submitted that this Anti-Trust Act contains within itself no ascertainable standard of guilt and is therefore void. What is a reasonable profit for those engaged in the retail milk business, a very hazardous business at best? At what price must milk be sold in order for the retailer to "conduct operations at a reasonable profit?" How is a reasonable profit to be arrived at? How can a dairyman determine in advance at what price to sell his milk in order to receive a reasonable profit and only a reasonable profit? He indeed would be a prophet who could so determine. Such statutes are condemned.

Campbell v. People, 72 Colo. 213.

United States v. Trenton Potteries Co.,——U. S. —— (decided Feb. 21, 1927).

Connolly v. Gen. Construction Co., 269 U. S. 385.

U. S. v. Cohen Grocery Co., 255 U. S. 181.

Lewis D. G. Co. v. Tedrow, 255 U. S. 98.

Weeds v. U. S., 255 U. S. 109.

Kinnane v. Detroit Creamery, 255 U. S. 102.

U. S. v. Penna. Ry., 242 U. S. 208.

International Harvester Co. v. Kentucky, 234 U. S. 216.

Collins v. Kentucky, 234 U. S. 634.

American Seeding Co. v Kentucky, 236 U. S. 660.

Missouri-Pacific v. Nebraska, 217 U. S. 196.

U. S. v. Brewer, 139 U. S. 278.

U. S. v. Trans-Missouri Freight Assn., 166 U. S. 290.

U. S. v. Reese, 92 U. S. 214.

U. S. v. Cap. Tracting Co., 34 App. Cases D. C. 592.

Louisville v. Commonwealth, 99 Ky. 132.

Tozer v. U. S., 52 Fed. 917.

Detroit Creamery Co. v. Kinnane, et al, 264 Fed. 845.

State v. Lantz, 90 W. Va 738.

The Supreme Court of Colorado in *Campbell v. People*, 72 Colo. 213, in applying the Anti-Trust Act to a monopoly restricting the free employment of labor, at page 216, says:

"The second point is seen to be of no force when we observe that the monopoly which would be created by the complete success of the combination which is charged would be a monopoly in the business of plumbing. The agreement then is not a contract in respect to labor alone nor does its intent relate to labor alone, but it aims, through a contract in regard to labor, *to control the business of plumbing in Colorado Springs*. We do not agree that the sole purpose of the act was to prevent *the restriction of dealing in commodities* but

think that it was also to ***prevent the restriction of competition*** and the attainment of the control of a business, i. e., monopoly." (Italics ours.)

Either purpose must of necessity have in view "operations" of some character. If "reasonable profits" only are in contemplation, no crime, if more than "reasonable profits," criminal.

In the Connally case, 269 U. S. 385, this Court, speaking through Mr. Justice Sutherland, has recently covered this subject in a manner which leaves little more to be said. The Court reviews the decisions in which statutes have been upheld as being sufficiently certain and places them in one of three classes: (a) those having a technical or special meaning well enough known to enable parties within their reach to correctly apply them; (b) those which have a well-settled common law meaning; (c) and those affording a standard of some sort. At page 391 the Court says:

> "That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties, is a well recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law. And a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law."

The statute there being construed provided that no less than the current rate of per diem wages in the locality where the work is performed should be paid to labor, etc. It was held that no ascertainable standard of guilt was furnished.

We submit that neither the words "reasonable profit," as applied to a retail milk business, nor the price at which milk should be sold in order to produce "a reasonable

profit" have a technical or special meaning, nor have they any well-settled or common law meaning, nor is there afforded a standard of any sort by which appellees may be guided.

The cases of *U. S. v. Cohen Grocery Company, Lewis D. G. Co. v. Tedrow, Weeds v. U. S.* and *Kinnane v. Detroit Creamery Company, supra*, all grow out of the Lever Act. That act among other things, provides "that it is hereby made unlawful for any person * * * wilfully to make any unjust or unreasonable rate or charge in handling or dealing in or with any necessaries * * *." It was held unconstitutional because no ascertainable standard of guilt was furnished.

It is submitted with confidence that those decisions are decisive of the question here. If there is a difference in prohibiting the sale of articles at an "unreasonable rate or charge," as in the Lever Act and the conduct of operations at "a reasonable profit," i. e., the sale of articles at a price which will produce a reasonable profit as in the Colorado Act, the difference is a matter of degree and not of principle. If the one provision violates the constitution, the other must do likewise.

In *United States v. Trenton Potteries Company*, decided February, 1927, construing the Sherman Act, this Court says, "Reasonableness is not a concept of definite and unchanging content. Its meaning necessarily varies in the different fields of the law. * * * * The reasonable price fixed today may through economic and business changes become the unreasonable price of tomorrow."

The cases of *International Harvester Company v. Kentucky, Collins v. Kentucky, American Seeding Company v. Kentucky, supra*, all involved the construction of the Kentucky Trust Law. In the Collins case, 234 U. S. 634, Mr. Justice Hughes, speaking for the Court, at page 638 of the opinion says:

"The statute by reason of its uncertainty, was fundamentally defective."

"He was thus bound to ascertain the 'real

value,' to determine his conduct, not according to the actualities of life, or by reference to knowable criteria, but by speculating upon imaginary conditions and endeavoring to conjecture what would be the value under other and so-called normal circumstances with fair competition, eliminating the abnormal influence of the combination itself, and of all other like combinations, and of still other combinations which these are organized to oppose."

In the Brewer case, 139 U. S. 278, at page 288, the Court says:

"Laws which create crime ought to be so explicit that all men subject to their penalties may know what act it is their duty to avoid."

In the Reese case, 92 U. S. 214, the Court had before it the indictment of an inspector of an election for refusal to receive and count a vote, at page 220, the Court says:

"Penal Statutes ought not to be expressed in language so uncertain. If the legislature undertakes to define by statute a new offense and provide for its punishment, it should express its will in language that need not deceive the common mind. Every man should be able to know with certainty when he is committing a crime."

In the Tozer case, 52 Fed. 917, supra, decision by Judge, later, Justice Brewer, the Court at page 919, said:

"In order to constitute a crime the act must be one which the party is able to know in advance whether it is criminal or not. The criminality of an act cannot depend upon whether a jury may think it *reasonable or unreasonable*. There must be some definiteness and certainty. * * * * There is a very little difference between such a statute and one which would make it a criminal

offense *to charge more than a reasonable rate.* (Italics ours.)

In *U. S. v. Pennsylvania*, 242 U. S. 208, supra, the words "reasonable request" and "reasonable notice" are criticized as being too indefinite, but the case was decided upon another point.

We conclude this portion of our brief with a quotation from the opinion of Judge Tuttle of the District Court, rendered in the case of *Detroit Creamery Company v. Kinnane*, 264 Fed. 842, the same case as that Supra, 255 U. S. 102, which points out some of the difficulties facing the appellees in the case at bar. That case involved the fixing of prices for milk claimed to be in violation of the Lever Act. Judge Tuttle at page 850 of the opinion says:

> "Such an indictment, however, could not specify the offense thus charged with any more detail, for the reason that the statute purporting to create such offense does not state the facts, acts or conduct necessary to constitute the crime denounced. What is an unjust rate or an unreasonable charge? In determining this question, what elements are to be taken into consideration? What is the test, or standard, or basis which is to be used in attempting to ascertain whether this statute has been violated? The statute itself furnishes no assistance in the way of answering this question. Is the reasonableness or justice of a rate to be determined by the amount of profit derived therefrom. If so, what percentage of profit from the business of selling a certain article makes the rate or charge in handling or dealing in that article unreasonable, and therefore unlawful and criminal? If such profit is derived from a business devoted to the sale of several kinds of articles, how is the portion of such profit properly chargeable to each of such articles to be determined, so that the person engaging in such business may know

whether or not he is a criminal? What elements enter into the question whether any particular charge is just or unjust, reasonable or unreasonable? What relation to the reasonableness of a rate have the cost of labor, the cost of machinery and of raw material, the cost of overhead charges, and the other expenses of production? How is the amount properly chargeable to these expenses to be fixed and ascertained? To what extent are differences in market conditions in different places to be considered? Is the existence or absence of competition to be taken into account? Is any allowance to be made for losses and misfortunes which affect costs and profits? To whom must a rate of charge be unjust, to be "unjust" within the meaning of this statute? Is it the effect which a rate or charge has upon the seller, or which it has on the purchaser, which renders it reasonable or unreasonable?"

So here, where is there a standard to guide appellees in determining their "conduct of operations" so as to produce "a reasonable profit" and only a reasonable profit? How are they to know at what price to retail milk in order to obtain that result?

2. THE COLORADO ANTI-TRUST LAW IS UNCONSTITUTIONAL BECAUSE IT VIOLATES THE DUE PROCESS AND EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT IN EXEMPTING FROM ITS PROVISIONS COMBINATIONS HARVESTING, MARKETING OR DEALING IN AGRICULTURAL PRODUCTS.

As amended by the Marketing Act and interpreted by the Supreme Court of Colorado, the Colorado Anti-Trust Act exempts from its provisions combinations harvesting, marketing or dealing in agricultural products, thereby denying to appellees and others, due process and the equal

protection of the laws, in violation of the Fourteenth Amendment to the Constitution of the United States.

> *Colorado Anti-Trust Act*, page 26, Appellant's Brief.
>
> *Colorado Marketing Act*, page 30, Appellant's Brief.
>
> *Rifle Potato Growers Ass'n v. Smith*, 78 Colo. 171.
>
> *Connolly v. Union Sewer Pipe Company*, 184 U. S. 540.
>
> *Beatrice Creamery Co. v. Cline*, 9 Fed. (2nd) 176.

By reference to the Colorado Anti-Trust Act (p. 27 Appellant's Brief) it will be seen that persons, firms or corporations engaged in the business of selling or manufacturing commodities of a similar or like character may employ, form, organize or own an interest in associations, firms or corporations transporting, marketing, or delivering such commodities without coming within the provisions of that Act.

The Colorado Marketing Act (p. 30 of Appellant's Brief) authorizes the formation of associations for the harvesting, marketing and dealing in agricultural products. Paragraphs 22 and 29 (p. 39 and 40 of Appellant's Brief) read as follows:

> "Section 22—Any provisions of law which are in conflict with this Act shall be construed as not applying to the associations herein provided for."
>
> "Section 29—No association organized hereunder and complying with the terms hereof shall be deemed to be a conspiracy or a combination in restraint of trade or an illegal monopoly; or an attempt to lessen competition or to fix prices arbitrarily nor shall the marketing contracts and agreements between the association and its members or any agreements authorized in this Act be considered illegal as such or in unlawful restraint

of trade or as part of a conspiracy or combination to accomplish an improper or illegal purpose."

The Colorado Marketing Act was interpreted and construed by the Supreme Court of Colorado in the case of *Rifle Potato Growers Association v. Smith*, 78 Colorado, 171. At page 175, the Court says:

"In support of the act the plaintiff in error has cited *Oregon Growers Co-Operative Association v. Lantz*, 107 Ore. 561, 212 Pac. 811. That case, however, is not in point, because the Oregon act applied to all persons, not to agriculturists alone, nor to any specified class. The question, therefore, under our act, become a serious one, because by sections 1 and 3 the above privilege is conferred only upon persons engaged in the production of agricultural products and is applied to agricultural products alone."

And at page 174, the Court further says:

"It is objected that the contract is in restraint of trade and so void under the Colorado Anti-Trust Law (C. L. 1921, par. 4036-4043), but the act of 1923, being the later act, *controls the earlier.*" (Italics ours.)

Circuit Judge Lewis, speaking for the Court, below in the case at bar, at page 180 of the reported case, says:

"Nothing can be plainer than that these combinations authorized through the formation of the associations as provided for in the Act would, in fact, be combinations in restraint of trade and an attempt to lessen competition in the marketing of agricultural products. A declaration that they should not be so considered is as futile as a statement that white is black."

And again,

"There can be no doubt that the later act

(Marketing Act) exempted the associations which it authorized from the penalties and restrictions of the earlier (Anti-Trust) Act."

It must be admitted that the effect of the Colorado Marketing Act is both by its terms and as construed by the State Supreme Court, to amend or write into the Colorado Anti-Trust Act, a provision exempting from its provisions associations harvesting, marketing or dealing in agricultural products.

It is settled law that the Federal Courts will accept the interpretation and construction placed upon State Statutes by the State Supreme Court.

Swiss Oil Corporation v. Shanks, ——U. S. (decided February 21, 1927).

The question then presents itself, Does the exclusion of combinations engaged in harvesting, marketing or dealing in agricultural products, from the provisions and penalties of the Anti-Trust Act, deny to appellees and others due process and the equal protection of the laws guaranteed by the Fourteenth Amendment, and by so doing render the Anti-Trust Act unconstitutional?

That question we submit has been settled for all time by this Court in the case of *Connolly v. Union Sewer Pipe Company*, 184 U. S. 540. That case involved the construction of the Anti-Trust Act of the State of Illinois. That Act in its main provisions was similar to the Anti-Trust Act of Colorado. The 9th Section of said Act reads:

> "The provisions of this Act shall not apply to agricultural products or live stock while in the hands of the producer or raiser."

In holding the Illinois Act unconstitutional this Court, at page 563 of the opinion says:

> "A state may in its wisdom classify property for purposes of taxation, and the exercise of its

discretion is not to be questioned in a court of the United States, so long as the classification does not invade rights secured by the Constitution of the United States. But different considerations control when the State, by legislation, seeks to regulate the enjoyment of rights and the pursuit of callings connected with domestic trade. In prescribing regulations for the conduct of trade, it cannot divide those engaged in trade into classes and make criminals of one class if they do certain forbidden things, while allowing another and favored class engaged in the same domestic trade to do the same things with impunity. It is one thing to exert the power of taxation so as to meet the expenses of government, and at the same time, indirectly, to build up or protect particular interests or industries. It is quite a different thing for the State, under its general police power, to enter the domain of trade or commerce, and discriminate against some by declaring that particular classes within its jurisdiction shall be exempt from the operation of a general statute making it criminal to do certain things connected with domestic trade or commerce. Such a statute is not a legitimate exercise of the power of classification, rests upon no reasonable basis, is purely arbitrary, and plainly denies the equal protection of the laws to those against whom it discriminates. * * *"
And at page 564:

"Returning to the particular case before us, and repeating or summarizing some thoughts already expressed, it may be observed that if combinations of capital, skill or acts, in respect of the sale or purchase of goods, merchandise or commodities, whereby such combinations may, for their benefit exclusively, control or establish prices, are hurtful to the public interests and should be suppressed, it is impossible to perceive

why like combinations in respect of agricultural products and live stock are not also hurtful. Two or more engaged in selling dry goods, or groceries, or meats, or fuel, or clothing, or medicines, are, under the statute, criminals, and subject to a fine, if they combine their capital, skill or acts for the purpose of establishing, controlling, increasing or reducing prices, or of preventing free and unrestrained competition amongst themselves or others in the sale of their goods or merchandise; but their neighbors, who happen to be agriculturists and live stock raisers, may make combinations of that character in reference to their grain or livestock without incurring the prescribed penalty. Under what rule or permissible classification can such legislation be sustained as consistent with the equal protection of the laws? * * * We conclude this part of the discussion by saying that to declare that some of the class engaged in domestic trade or commerce shall be deemed criminals if they violate the regulations prescribed by the State for the purpose of protecting the public against illegal combinations formed to destroy competition and to control prices, and that others of the same class shall not be bound to regard those regulations, but may combine their capital, skill or acts to destroy competition and to control prices for their special benefit is so manifestly a denial of the equal protection of the laws that further or extended argument to establish that position would seem to be unnecessary."

Appellant, at page 16 of his brief asserts that while the Connolly case has not been overruled, it has been modified by later decisions of this Court, and cites three cases in support of that statement. The first case, *New York Central Company v. White*, 243 U. S. 188, involved the construction and application of the New York Workmen's

Compensation Law. The second case, ***Miller v. Wilson***, 236 U. S. 373, involved the construction of a California statute, regulating the hours of work for women. The application of the Connolly case to the questions involved in those cases is not apparent. The third case, ***International Harvester Company v. Missouri***, 234 U. S. 199, involved the construction of the Missouri Anti-Trust law. The only reference there to the Connolly case is in the concluding paragraph, at page 215 of the opinion, where the Court says:

> "It is said that the statute as construed by the supreme court of the state comes within our ruling in *Connolly v. Union Sewer Pipe Co.*, 184 U. S 540, but we do not think so. If it did, we should, of course, apply that ruling here."

Appellant cites Section 6 of the Clayton Act, which exempts "agricultural or horticultural organizations, instituted for the purposes of mutual help and not having capital stock or conducted for profit." And also, the decision of this court in the case of ***Duplex Company v. Deering***, 254 U. S. 443, construing that section. However, the Colorado Marketing Act provides for organizations with both common and preferred shares with power to harvest, purchase, own, sell and market agricultural products of its members and non-members alike. The main and controlling purpose of such organizations being to control the market and thereby the market price of agricultural products for the profit and gain of its members. The Clayton Act has no application here.

Appellant at great length endeavors to show that the Colorado Marketing Act and similar acts are valid. Its validity, however, as held by the Supreme Court of Colorado in the Potato Growers case, Supra, is dependent upon the fact that such organizations are withdrawn and exempted from the provisions of the Colorado Anti-Trust Act. The trial court at page 180 of the reported case below, says:

"Of course, we do not pretend to say that the Legislature did not have the power to exempt such combinations from prosecution and dissolution as unlawful common law or stautory trust. That was entirely a matter for its consideration."

We are not here contending that the Marketing Act is void, nor is it necessary to criticise public policy claimed to be the basis of such acts. We are simply saying that neither the Marketing Act, nor the Anti-Trust Act can suspend, or modify the Fourteenth Amendment to the Constitution of the United States so as to permit trusts or combinations to harvest, deal in or market agricultural products and at the same time condemn combinations producing or marketing other commodities. Can it be said that the State of Colorado can by legislation permit and encourage combinations to fix and control the price of agricultural products, the State's largest industry, and declare the same or similar combinations criminal when engaged in gathering or marketing coal and minerals, the State's second largest industry?

III.

THE COLORADO ANTI-TRUST ACT BEING UNCONSTITUTIONAL APPELLEES WERE ENTITLED TO THE WRIT OF INJUNCTION.

The complaint alleges that it was appellant's purpose and intention of at once instituting civil proceedings for the forfeiture of the Articles or Charters of the three appellee corporations. That it was his purpose to file other criminal informations and procure grand jury indictments, either or both of which proceedings would utterly destroy the good will and property of appellees, and also that there was pending an information against all of appellees charging them with conspiracy to violate the law. These facts were alleged in the complaint and the complaint taken as confessed.

Injunctive relief granted appellees was proper:

(a) Injunction will issue to restrain the institution of civil and criminal proceedings under void statutes where property rights are being jeopardized.

(b) The question whether injunction will issue to stay pending prosecutions was not properly raised in the trial court is not here for review.

(c) If otherwise, such relief will be granted, particularly under the facts of the case at bar.

I. THREATENED PROCEEDINGS, CIVIL OR CRIMINAL, UNDER UNCONSTITUTIONAL STATUTES WILL BE ENJOINED WHERE NECESSARY TO PROTECT PROPERTY RIGHTS.

The principal purpose of the complaint was to have the Colorado Anti-Trust Act declared unconstitutional and to prevent the institution of proceedings for the forfeiture of the charters of appellees, the consequent appointment of receivers and thereby the utter destruction of appellee's business, good will, property and property rights, and also to enjoin the institution of further criminal proceedings based upon said act having the same effect. Granting the law to be unconstitutional, it is too well settled that appellees are entitled to such relief to require extended argument.

The trial court below, at page 181 of the opinion finds:

> "The District Attorney and the Attorney General of the State, who also made argument and submitted brief, do not deny that it is the duty of the court, on the facts stated, to grant the writ enjoining the institution of further court proceedings, civil and criminal, if we hold the Anti-Trust Act to be unconstitutional."

Such is the law even though not conceded by appellant:

Philadelphia v. Stimson, 223 U. S. 605.

Truax v. Raich, 239 U. S. 33.

Kennington v. Palmer, 255 U. S. 100.
Terrace v. Thompson, 263 U. S. 197.
Packard v. Banton, 264 U. S. 140.
Hygrade Provision Co. v. Sherman, 266 U. S. 497.
Tyson & Bros. v. United Theatre Ticket Offices— *U. S.* (decided Feb. 28, 1927).

In the case of Packard v. Banton, at page 143, this court says:

"But it is settled that 'a distinction obtains and equitable jurisdiction exists to restrain criminal prosecutions under unconstitutional enactments, when the prevention of such prosecution is essential to the safeguarding of rights of property'. *Truax v. Raich*, 239 U. S. 33. The question has so recently been considered that we need do no more than cite *Terrace v. Thompson*, 263 U. S. 197, where the cases are collected, and state our conclusion that the present suit falls within the exception, and not the general rule."

In *Tyson & Bros. v. Ticket Offices*, Supra, this court said:

"Following the rule frequently announced by this court, that 'equitable jurisdiction exists to restrain criminal prosecutions under unconstitutional enactments, when the prevention of such prosecutions is essential to the safeguarding of rights of property,' we sustain the jurisdiction of the District Court."

2. THE QUESTION AS TO WHETHER THE COURT WILL ENJOIN A PENDING PROSECUTION IS NOT PROPERLY HERE FOR REVIEW

In the trial court appellant filed his motion to dismiss, which was in the nature of a general demurrer, and in which the complaint was attacked as a whole, as being with-

out equity because the facts stated were insufficient to entitle appellees *to any* relief. No attack was made in the motion against those parts of the complaint setting up the pendency of prosecutions nor against the specific prayer asking that such actions be enjoined. (R. 12.) The motion being denied appellant declined to plead further and a decree pro confesso was entered (R. 33). It may be added that the interlocutory injunction became functus officio when the final decree become effective. No appeal is taken therefrom (R 34). So the question here is whether the complaint taken in its entirety entitled appellees to equitable relief, and possibly the further question of whether the final decree is justified by the facts set forth in, and the relief sought by, the complaint.

Equity rule 29 provides how defenses may be urged. It is there clearly stated that defense may be made by motion to dismiss or in the answer, and that such points of law as go to the whole or a material part of the cause can be set down and heard separately. It is there further provided, that if the motion be denied answer shall be filed in five days or a decree pro confesso entered.

Incidentally it may be observed that when the interlocutory injunction was granted the court divided two to one on the question of appellees right to enjoin the pending prosecutions, but that when the complaint was taken as confessed and the final decree entered in conformity with the complaint the three Judges joined in the granting of the same.

If it was the intention of appellant to attack some part of the complaint, less than the whole, it should have been done by motion directed to that part of the complaint so assailed, or in the answer.

If then, the law be unconstitutional, as we contend appellees were entitled to some measure of relief and this court will not inquire whether the relief granted was greater than that to which appellees might otherwise be technically entitled, if the relief granted is supported by the allegations in the complaint as amended.

In the case of *Masterson v. Howard*, 85 U. S. 99, first syllabus prepared by Mr. Justice Field, it is said:

> "Where a decree is entered upon an order taking a bill in equity as confessed by defendants for want of an answer, the only question for the consideration of this court on appeal is, whether the allegations of the bill are sufficient to support the decree."

In *Thompson v. Wooster*, 114 U. S. 104, a case in which a decree was taken as confessed, this court at page 110 says:

> "The defendants are concluded by that decree, so far at least as it is supported by the allegations of the bill, taking the same to be true. Being carefully based on these allegations, and not extending beyond them, it cannot now be questioned by the defendants unless it is shown to be erroneous by other statements contained in the bill itself."

3. INJUNCTION WILL BE GRANTED RESTRAINING PENDING PROSECUTIONS UNDER INVALID STATUTES WHERE THEIR CONTINUANCE WILL INVADE AND DESTROY VALUABLE PROPERTY RIGHTS, WHERE AS HERE, RELIEF CANNOT BE HAD IN STATE COURTS.

We think it appropriate to set forth here the interpretation of the pleadings and findings of fact as made by the trial court bearing upon this question. At page 181 of the opinion the court below says:

> "The pleadings here and affidavits in support disclose that the State District Judge overruled motions to quash the information, declined to hear further argument from defendants' counsel in that case on the unconstitutionality of the State Anti-Trust Act, and has set that case down for trial

at an early date. Under the State practice defendants in a criminal case cannot be heard in the State Supreme Court until after conviction, and the removal of their case to that court after the happening of that event, and putting it in condition to be finally heard there, required time, frequently extended by unexpected delays. We are further informed by the proof that the record in that case will necessarily be voluminous. The four corporate defendants are jointly charged; their books and records will become competent proof in arriving at the question as to what are reasonable prices and profits for their products, which will involve a full investigation of the business of each company and require expert testimony. Such a record cannot be put in shape for the appellate court until after the lapse of many months. In the meantime the Act prohibits them from transacting any business in the State of Colorado. A verdict of guilty will be conclusive proof that they have violated the State Anti-Trust Act. It will also be conclusive proof in a suit to forfeit their rights and franchises and dissolve them, and a good defense in actions they may bring against their debtors. Under the charges made in the bills it therefore seems clear that further prosecution of the pending information is but a step in the invasion of their property rights, and if continued those rights will be wholly destroyed under an invalid law."

Under this state of facts we submit it was the duty of the trial court to enjoin the pending prosecution, which was incidental to the main relief sought.

Farnum & Davis v. Los Angeles, 189 U. S. 207.
Truax v. Raich, 239 U. S. 33.
Missouri v. Chicago Railway Co., 241 U. S. 533.
Oklahoma Gas Company v. Russell, 261 U. S. 290.

Dearborn Pub. Co. v. Fitzgerald, 271 Fed. 479.
Springfield Spinning Co. v. Riley, L. R., 6 Eq. 551.

In the Farnum & Davis case, Supra, the object sought was to have declared unconstitutional certain ordinances of the City of Los Angeles and to enjoin pending prosecutions thereunder. The court at page 217 says:

> "As the only method employed for the enforcement of these ordinances was by criminal proceedings, it follows that the prayer of the bill to enjoin the city from enforcing these ordinances, or prevent plaintiff from carrying out its work, must be construed as demanding the discontinuance of such criminal proceedings as were already pending, and inhibiting the institution of others of a similar character."

And upon these facts, the court at page 218 says :

> "It would seem that, if there were jurisdiction in a court of equity to enjoin the invasion of property rights through the instrumentality of an unconstitutional law, that jurisdiction would not be ousted by the fact that the state had chosen to assert its power to enforce such law by indictment or other criminal proceedings. *Springfield Spinning Co. v. Riley, L. R.*, 6 Eq. 558."

The Springfield case, Supra, cited with approval in the Farnum & Davis case, at page 558, holds that:

> "The jurisdiction of this court is to protect property, and it will interfere by injunction to stay proceedings, whether connected with crime or not, which go to the immediate, or tend to the ultimate distribution of property, or make it less valuable or comfortable for use or occupation."

In *Truax v. Raich*, 239 U. S. 33, the Court at page 37 says:

"It is also settled that while a court of equity, generally speaking, has 'no jurisdiction over the prosecution, the punishment, or the pardon of crimes or misdemeanors', a distinction obtains, and equitable jurisdiction exists to restrain criminal prosecutions under unconstitutional enactments, when the prevention of such prosecutions is essential to the safeguarding of rights of property."

It will be noted that the court does not there say that "threatened criminal prosecution" will be enjoined, but contents itself with saying that "criminal prosecutions" will be enjoined.

At this point we desire to emphasize the first portion of the trial court's findings, as above set out, to the effect that appellees had exhausted their effort to obtain relief in the State Court. And in addition to the facts, there stated, it appears that the retail milk business is largely a matter of good will; that the conduct of a trial to a jury would furnish a local hostile press the opportunity of destroying that good will and would otherwise have the effect of destroying property and property rights, which could never thereafter be restored, even though on final appeal the act was held unconstitutional (original transcript p. 67).

We submit that these facts bring the case squarely within the principle announced by this court in the case of *Oklahoma Gas Company v. Russell*, 261 U. S. 290. In that case the corporation commission had fixed rates which were alleged to be confiscatory. An appeal was taken to the State Supreme Court. A supersedeas staying the operation of the rates was denied by the Supreme Court pending the hearing of the case upon its merits. This court holding that under such circumstances injunctive relief would be granted, speaking through Mr. Justice Holmes, at page 293 of the opinion says:

"Coming to the principal question, if the plaintiffs respectively can make out their case, as

must be assumed for present purposes, they are suffering daily from confiscation under the rate to which they now are limited. They have done all that they can under the state law to get relief and cannot get it. If the Supreme Court of the state hereafter shall change the rate, even nunc pro tunc, the plaintiffs will have no adequate remedy for what they may have lost before the court shall have acted. *Springfield Gas & E. Co., v. Barker*, 231 Fed. 331, 335. In such a state of facts *Prentis v. Atlantic Coast Line Co.* has no application. See *Love v. Atchison, T. & S. F. R. Co.*, 107 C. C. A. 403, 185 Fed. 321, 324, 325. Rules of comity or convenience must give way to constitutional rights."

This Court has frequently said Section 265 of the Judicial Code announces a rule of comity. As tersely put by Mr. Justice Holmes in the Oklahoma Gas Company case,

> "Rules of comity or convenience must give way to constitutional rights."

The cases of, in re, *Sawyer: Harkrader v. Wadly* and *Fitz v. Magee*, cited by appellant on this question are reviewed and classified by this court in the Farnum & Davis case, Supra, as simply announcing the general rule of comity and having no application to the exceptions.

The case of Ex Parte Young, 209 U. S., involved the question of Minnesota freight rates, was not brought to enjoin a pending action and the statement at page 162 to the effect that such action will not be enjoined is clearly dictum.

The cases of *Essanay Film Co. v. Kane*, 258 U. S. 358, and *Hull v. Burr*, 234 U. S. 712, cited by appellant, are cases illustrative of the general rule and not the exceptions which we here urge. In the Essanay case, this court in speaking of the rule, at page 361 of the opinion says:

> "In exceptional instances the letter has been

departed from while the spirit of the prohibition has been observed."

And at page 362,

"The case before us presents no exceptional features and the courts below correctly disposed of it."

To hold that the court having jurisdiction of the parties and the subject matter, had power to grant only partial relief, is to deny to a Federal Court of Equity that power supposed to be inherent in every court of equity, under similar circumstances, to grant full relief. The trial court on this phase of the case, at page 182 of the reported opinion says:

"Where a criminal prosecution results directly in the invasion and destruction of property rights, we do not doubt that it is within the power and duty of a court of equity to enjoin the administrative officer who has charge of that prosecution if there be no valid law on which the accusation rests. The claimed difference, under those conditions, between pending and threatened cases is, in our judgment, without substance. We venture to say, on the authority of the Davis & Farnum case, that it can make no difference, on the question of jurisdiction, when prosecution is begun under an invalid law, whether before or after a bill is exhibited, if there be an unlawful invasion by virtue thereof of property rights."

IV.

CONCLUSION.

We therefore, respectfully submit:

First. That the Colorado Anti-Trust Act is unconstitutional because it furnishes no ascertainable standard of guilt, and further in exempting from its provisions dealers in agricultural products, it denies the equal protection of the laws to appellees.

Second. That valuable property rights of appellees are jeopardized by the enforcement of said Act.

Third. That the trial court had the power, and under the circumstances of the instant case, it was its duty to declare the Act void and to enjoin its enforcement in every manner, including threatened and pending actions, civil and criminal.

Respectfully submitted,

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